United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

332

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,411

UNITED STATES OF AMERICA

v.

LAWRENCE KEARNEY,

Appellant

Appeal from the United States District Court for the District of Columbia

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BRIEF FOR APPELLANT

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ISSUES PRESENTED FOR REVIEW

1. Whether evidence was illegally seized from the defendant's home, and hence erroneously admitted,

(a) Because the evidence was not mentioned in the warrant which authorized the search; or

(b) Because the search warrant did not particularly describe the things to be seized; or

(c) Because the search warrant authorized a search for and seizure of objects not within the categories of Rule 41(b), Federal Rules of Criminal Procedure.

2. Whether evidence that the defendant's blood was of the

same type as the blood of the assailant was irrelevant and hence erroneously admitted.

3. Whether testimony of a police officer of what another officer told him had been said by the victim was erroneously admitted.

4. Whether testimony by a police officer narrating his interview of the victim was erroneously admitted because:

a. The declarations of the victim could not qualify as a "spontaneous utterance;"

b. The trial court did not make, and impliedly rejected, findings of the facts prerequisite to admissibility as a "dying declaration;" and

c. An adequate foundation was not laid for admission as a "dying declaration."

5. Whether the trial court erroneously restricted cross-examination of an eye-witness of the crime.

This case has not been previously before this Court.

STATEMENT OF THE CASE

The appellant, Lawrence Kearney, was indicted on charges of first degree murder of Gilbert M. Silvia (D.C. Code §22-2401) and carrying a pistol without a license (D.C. Code §22-3204). After trial by jury before District Judge Walsh, he was convicted

of second degree murder and of carrying an unlicensed pistol. On September 13, 1968, he was sentenced to concurrent sentences of fifteen years to life imprisonment on the murder count and three to ten years on the weapon count.

On November 23, 1967, shortly before 11 p.m., detective Gilbert M. Silvia was shot at Corcoran and 16th Sts. N. W. (Tr. 35, 49, 380-82). Police found him lying in the street at 11 p.m. (Tr. 142, 147-48).

Silvia's hospital interview

Silvia was admitted to the emergency room of the Washington Hospital Center in critical condition at 11:15 p.m. on November 23. He was put under deep anesthesia, operated on from midnight to 3:30 a.m. November 24, and then taken to the recovery room. At 9:15 a.m. on November 24, he was moved to the intensive care unit, still in critical condition and in pain. (Tr. 291-94, 296, 314-15.) At about 10:30 a.m., November 24, he was interviewed for about 10 to 12 minutes by detective sergeant Bernard D. Crooke (Tr. 322, 377).

Over defense objection, the trial court admitted testimony of a government witness, detective John W. Cannon, of what Crooke had told him had been said by Silvia concerning the shooting

episode (Tr. 207-10).[1]

Subsequently, the trial court held a hearing outside the presence of the jury to determine the admissibility of proposed testimony by Crooke on what was said at the interview. The court heard medical testimony, which we have previously summarized, as to Silvia's condition and treatment, and testimony by Crooke concerning the interview (Tr. 282-330). The prosecutor requested that Crooke's account of the interview be admitted on two grounds - as a "spontaneous statement" and as a "dying declaration" (Tr. 334-35). Over defense objection (Tr. 330-33), the court ruled that Crooke's testimony would be admitted before the jury as a "spontaneous utterance" (Tr. 334-35).

Crooke testified (Tr. 378-84):[2]

"When he [Silvia] saw me he said, 'Hi Bernie.' And, of course, I greeted him and we talked for a few moments.

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1. We discuss in our Argument the theory, if that is the right word, on which this testimony was admitted. We do not here recite the testimony because it was a condensed summary of Crooke's testimony, which is later stated at length.

2. The quoted excerpts are from Crooke's testimony before the jury except for the portion in brackets, which was given in the preliminary hearing before the court but edited out of the subsequent jury testimony (Tr. 370).

["I talked to him briefly trying to kid him, get him to smile, but he didn't seem like he was even, he didn't seem like he was looking at me. And then suddenly after I stopped, he looked right at me and said, 'Take care of my wife and family.' (Tr. 323)].

* * * *

"I told him of the importance of an interview at that time which he, being a policeman, said he understood and said he knew.

* * * *

"He told me that he was in his cruiser alone - by himself - and he was proceeding south on 16th Street and when he reached Corcoran Street - this is Northwest - he had a red light and stopped; and it was at this time he observed a Negro male working on the window of a 1959 Chevrolet with Connecticut tags that was parked on the southeast corner of 16th and Corcoran Streets.

"He said he watched him briefly and the light changed so he proceeded south through the intersection and made a U-turn, turned his lights out and pulled up to the east curb of 16th Street, south of Corcoran. There is a church there and he said he pulled up in front of the church giving him a view of the automobile and the

subject whom he said was working on the window.

"He said the man popped the window -- which in our terms means break -- and opened the door. He said the subject got in the car and slid across the seat behind the wheel.

"He was watching and about this time a second Negro male came west on Corcoran Street. He was walking from the eastern direction of the car. He approached the same Chevrolet that the first subject had gotten into on the passenger side and opened the door and appeared to say something to this man.

"Silvia said that at this time he felt that the second man had made him, meaning Silvia. What he meant by that was that they had spotted him as a policeman. So he decided to move in. He pulled the cruiser around the corner into Corcoran Street on an angle behind the Chevrolet.

"He got out of the cruiser, took his badge out and had his flashlight in his hand. He said he approached the driver's side of the Chevrolet parked at the curb and had his flashlight shining on his badge and identified himself as a policeman.

"He said at this time the second man was still

standing on the passenger side of the car in the grass area or sidewalk area. He said after he identified himself to the man in the car the man removed a single key from the ignition and slid across the seat to the passenger door, opened the door and got out.

"Silvia said that he, Silvia, proceeded around behind the Chevrolet and approached the two men from the back of the Chevrolet.

"He said, as he approached, the man who was in the car had his back towards him, him Silvia. Suddenly, the man spun around and had a gun in his hand and fired one time.

"He said he fell to the pavement and the two men fled east on Corcoran Street from that location on the south side of the street.

"He said he tried to crawl back to the cruiser but he couldn't make it."

* * * *

"Q. Did you ask him any questions? A. Yes. The rest of what he said was in answer to my questions.

"Q. What questions did you ask? A. I asked him if he could describe the gun and he said it looked like an old-brownish gun. He said he thought it was a .38.

He said it sounded like a .38. And he said he believed that it was a revolver.

"Q. Did you ask any other questions? A. I asked him if either one of the men were carrying anything and he said he didn't see anything; and he added at this time that he also couldn's see what the man used to pop the window.

"It was at this point that I asked him if he could describe the subjects.

"Q. Did he give you any description? A. Yes, sir, he did.

"Q. What did he say? A. He described what we call the No. 1 subject, the man who was in the car and the man who fired the shot. He said this was a Negro male, between maybe thirty and thirty-five, about five feet, ten inches tall and a stocky build. He said maybe 190 to 200 pounds.[3/] He said the man had a medium to dark complexion, that he was wearing a snap-brim hat which he thought possibly was plaid, and a three-quarter length, brownish looking coat. He said the man appeared neat in appearance.

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3. According to police measurements, on November 26, 1967, the defendant was 5 feet, 7½ inches tall (possibly wearing shoes) and weighed 173 pounds in his clothes (Tr. 839-41).

And this was the man who had what he thought was a revolver and the man who had shot him, and the same man who had entered the automobile.

"Q. Did he give you a description of the other person who was standing there? A. Yes. He said this was a Negro male between maybe twenty and twenty-five years of age, about six feet tall, thin build, wearing a snap-brim hat. He said he couldn't say what color. And a white trench-coat.

"Q. Is that the end of what he told you? A. I asked him one more question, that is if he heard the men say anything. And he said, no, he didn't. He said he hadn't heard them say anything."

Silvia's condition began to deteriorate after the interview, and he died on the operating table at 2:10 a.m., November 25 (Tr. 291, 297). The gunshot wound was the cause of death (Tr. 172).

Warren s testimony

The "second man" referred to by Silvia was Stanley W. Warren, age 17, an acquaintance of the defendant (Tr. 32). He testified for the government as follows. At about 10:30 or 10:45 p.m. on November 23, while he was walking on Corcoran Street, the defendant waved to him from a parked car. He went

over and talked to the defendant, who was at the wheel, through a broken vent window of the car. He told the defendant that a police car was on the corner. A few minutes later, the police car pulled up. The occupant got out, exhibited his wallet identification in one hand, illuminated by a flashlight in the other hand. The police officer asked the defendant for identification. The defendant got out of the car, said he would show his identification, pulled a gun from his pants, and shot the police officer from a distance of three or four feet. Warren then ran from the scene. (Tr. 33-54.)

Defense counsel had previously been given, in accordance with the Jencks Act, Crooke's written resume of his interview of Silvia. According to the resume (which is not in the record but is in counsel's possession), Silvia told Crooke that the second man at the scene of the shooting (i.e., Warren) "might be a junkie because of something about his eyes that he could not describe."[4/] Although this item was called to the court's attention, the court denied defense counsel's request to be permitted to cross-examine Warren on whether he was a user of narcotics and had been under the influence of narcotics at the

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4. Crooke omitted this item from his detailed testimony of the statements made to him by Silvia.

time he saw the shooting and when he gave the police a pre-trial statement identifying the defendant as the man who shot Silvia (Tr. 54-57).

The court also refused to permit the defense to cross-examine Warren as to whether he had been "prematurely released perhaps for the purposes of this trial" from confinement in the Receiving Home for a juvenile offense (Tr. 57-58).

The search and ballistics testimony

The defendant was arrested in his home in the early morning of November 26, 1967. His home was not then searched. (Tr. 238, 240-41.) On November 27, a detective sergeant applied for a warrant to search the defendant's apartment at 1442 Corcoran St. N.W.[5/] The warrant application recited the substance of the statements made by Silvia in his hospital interview and information from "a Negro male, 16 years of age" (i.e., Warren) naming the defendant as Silvia's assailant. The application further recited that on the basis of these statements the applicant believed that "the dark colored three quarter coat and plaid hat worn by Lawrence Kearney at the time he shot

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5. A copy of the application was marked G. Ex. I for identification (Tr. 222), but is not in the record, which in fact does not contain even admitted exhibits. The copy of the application is reproduced in the Appendix to this brief.

Gilbert Silvia are now inside" Kearney's apartment. The application therefore requested issuance of a search warrant "for the seizure of same as instrumentalities of this crime in that they helped conceal the identity of Kearney while on the scene and aid in his flight."

The United States Commissioner issued a warrant authorizing a search of the defendant's apartment and the seizure of the described coat and hat, "the instrumentalities of the crime of first degree murder committed on the person of Detective Gilbert N. Silvia . . . and any other instrumentalities of the aforesaid crime" (Tr. 231-32).[6/]

The search was made on November 27, 1967. The coat and hat were not found. The searchers did find, however, a spent bullet embedded in a wall of the apartment[7/] and a .38 unfired cartridge, found in a drawer of a dresser in the bedroom (Tr. 219-20, 236). These items were admitted in evidence, over defense objection (Tr. 231-33, 473), as Government Exhibits 2 and 3, respectively

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6. The quoted text was read into the record by defense counsel. The warrant is not in the record. We request that the government produce it to the Court.

7. The searcher testified that he recovered the bullet "from inside the doorway" (Tr. 236). The prosecutor stated in summation that the bullet had been "fired sometime in the past into the wall of [the defendant's] apartment" (Tr. 875) and had been "embedded in the wall" (Tr. 892).

(Tr. 235, 473). The bullet recovered from Silvia's body (G. Ex. 1; Tr. 172, 473) was .38 calibre (457-58). The government introduced expert testimony that Government Exhibits 1 and 2 were too mutilated to permit them to be identified as having been fired from the same weapon, but that "the microscopic markings on each of these bullets are like those produced by the barrel or the same type of barrel. All of the bullets are of the same manufacturer. They are the same in manner of construction. They are the same in calibre type, and they bear rifling impressions which are produced by the same type of weapon." (Tr. 448.)[8/]

The blood test evidence.

The stolen car in which the assailant was sitting when Silvia approached had a broken vent window bearing traces of blood (Tr. 195). Blood traces were also found inside the glove compartment of the car. The blood in the compartment came from an individual possessing type A blood. (Tr. 435, 467-470A.) Silvia had type O blood (Tr. 318-19, 470G, 473). Counsel on both sides emphasized to the jury the inference that Silvia's assailant

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8. The same testimony also applied to a bullet (G. Ex. 5A) recovered from a log (G. Ex. 5) into which, according to a government witness, the defendant had fired a gun (Tr. 180-82, 247, 443-44, 473). The defendant denied that he had fired into the log (Tr. 736, 789-90). The gun used to shoot Silvia was never recovered (Tr. 241).

had cut himself when entering the locked car and that the blood in the glove compartment came from his hand (Tr. 904, 920, 928, 944-45).

At the request of the defense, the trial court ordered that the defendant's blood be typed (Tr. 411). Over defense objection, the result of this test, showing that the defendant had type A blood, was admitted in evidence (Tr. 416-17, 421, 430).

Other government evidence

The government introduced expert testimony that a palm print lifted from the steering wheel of the car stolen by Silvia's killer was identical with a print of the defendant's left palm (Tr. 257, 273-74, 346-47).

The government also introduced evidence that the defendant did not have a permit to carry a gun (Tr. 540-41).

Defense testimony

The defendant denied that he had shot Silvia (Tr. 725). He testified that at the time of the shooting, he was at home, where he was host to a birthday party for his wife (Tr. 717-19, 725). Three witnesses who had attended the party corroborated his alibi (Tr. 543-45, 587-91, 622-23).

A 14-year-old boy, Joseph B. Ramsey, saw the shooting from

the steps of an apartment building in the middle of the 1600 block of Corcoran Street. He testified that he did not see the face of the man who fired the shot, but that the assailant was "real tall," taller than the defendant (Tr. 678, 680-85).

The senior medical officer of the D. C. jail, a physician, examined the defendant on November 27, 1967, to determine whether he had any indications of a recent cut. He found no such indications on the defendant's hands or arms (Tr. 658, 662, 671). He also testified that the quantity of the blood traces found in the glove compartment of the car was such that the person who lost the blood would probably have had a visible incision or scar four days later (Tr. 674).

ARGUMENT

I. The trial court erroneously admitted prejudicial evidence which had been illegally seized.

A. Government Exhibits 2 and 3 were illegally seized, and hence erroneously admitted, because they were not mentioned in the search warrant.

Government Exhibit 2 (a bullet) and Government Exhibit 3 (a cartridge) were seized by the police in the course of a search of the defendant's apartment. The search was made pursuant to a search warrant which authorized seizure of a described coat and hat "and

any other instrumentalities of the . . . crime" of the murder of Detective Silvia. Supra, pp. 11-12. The exhibits were unconstitutionally seized and hence erroneously admitted.

The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." It was stated in a passage in Marron v. United States, 275 U.S. 192, 196 (1927), approvingly quoted in Berger v. New York, 388 U.S. 41, 58 (1967) and Stanford v. Texas, 379 U.S. 476, 485 (1965):

> "The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant."

Marron held that where officers armed with a search warrant seized "one thing under a warrant describing another," the seizure violated the Fourth Amendment and the object seized was inadmissible in evidence, unless the seizure was made in a search incidental to a lawful arrest on the premises. This was the holding even though the objects (1) were instrumentalities of the crime (the illegal sale of intoxicating liquors) which had prompted the issuance of the search warrant (see 275 U.S. at 199) and (2) were uncovered in the course of searching for the items specified in the warrant (see 275 U.S. at 194).

Other cases which have suppressed evidence because it was not described in the search warrant include United States ex rel. Nickens v. LaVallee, 391 F. 2d 123 (2d Cir. 1968); Cofer v. United States, 37 F. 2d 677 (5th Cir. 1930); United States v. Jordan, 216 F. Supp. 310 (S.D. Ill. 1963); United States v. Coots, 196 F. Supp. 776 (E.D. Tenn. 1961).

In addition, Berger v. New York, 388 U.S. 41, 50 (1967), recognizes that Weeks v. United States, 232 U.S. 383 (1914), prohibits "the use in federal courts of any evidence seized in violation of the [Fourth] Amendment" (emphasis added). Finally, Rule 41(e) of the Federal Rules of Criminal Procedure recognizes as a ground for the suppression of evidence that "the property seized is not that described in the warrant."

In this case, Government Exhibits 2 and 3 were obviously not described in the warrant which authorized a search of the premises on which the exhibits were found. The trial court seems to have thought that the exhibits came within that phrase of the warrant which authorized the seizure of "any other instrumentalities" of "the crime of first degree murder committed on the person of Detective Gilbert N. Silvia" (Tr. 234-35). This view is simply preposterous. Neither exhibit was or could have been an instrument of Silvia's murder. The bullet which killed him was admitted in evidence as Government Exhibit 1. The spent

bullet which is Government Exhibit 2 was found not in Silvia's body, but in a wall of the defendant's apartment. The cartridge which is Government Exhibit 3 had never been fired and was found in a dresser in the defendant's bedroom.

Since Government Exhibits 2 and 3 were not described in the search warrant, and since they were not found in a search incidental to a lawful arrest, they were, under the Fourth Amendment and Marron, illegally seized and therefore erroneously admitted in evidence.

Some decisions, though none by the Supreme Court, have created exceptions to Marron. Among these is Johnson v. United States, 110 U.S. App. D.C. 351, 293 F. 2d 539 (1961), which held that an officer making a search with a warrant describing certain stolen property could lawfully seize instrumentalities of a crime which he came upon in the course of the search, although the latter objects were not described in the warrant. Johnson ignored Marron, which it contradicts, and quoted (293 F. 2d at 540) an inapplicable passage from Harris v. United States, 331 U.S. 145, 154 (1947), referring to the "distinction between merely evidentiary materials, on the one hand, which may not be seized either under the authority of a search warrant or during the course of a search incident to arrest, and on the other hand those objects which may validly be seized including the instrumentalities and

means by which a crime is committed. . . ."[9/]

Leaving aside the fact that Johnson is contradictory to Marron, it does not apply in this case for two reasons. First, Exhibits 2 and 3 were not the instrumentalities of a crime or other contraband.

Second, Government Exhibit 2, the spent bullet which was dug out of the wall, was not exposed to plain view in the course of the search for the items described in the warrant, but must have been found in a deliberate search for any incriminating evidence. Even those cases which have accepted the Johnson "exception" hold that it applies only if, as was the situation in Johnson, the items not listed in the warrant were come upon by happenstance in the course of the search. Woo Lai Chun v. United States, 274 F. 2d 708 (9th Cir. 1960); Seymour v. United States, 369 F. 2d 825, 827 (10th Cir.); United States v. Barbanell, 231 F. Supp. 200, 207 (S.D. N.Y. 1964); People v. Kimmel, 34 Ill. 2d 579, 217 N.E. 2d 785 (1966). As these cases recognized, were

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9. Harris sustained a seizure of contraband discovered in a warrantless search incident to a lawful arrest. The passage quoted by Johnson merely restated the long-established principle (recently eliminated by Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967)) that the Fourth and Fifth Amendments forbade the seizure of "merely evidentiary" material. Harris in no way intimated a modification of Marron so as to permit the seizure of contraband not described in the search warrant and not found in a search incident to a lawful arrest. See United States v. Coots, 196 F. Supp. 776, 779 (E.D. Tenn 1961).

the rule otherwise it would violate the fundamental principle of the Fourth Amendment that general exploratory searches "cannot be undertaken by officers with or without a warrant." United States v. Rabinowitz, 339 U.S. 56, 62 (1950). The situation here is like that in the Woo Lai Chun case, supra, in which Judge Bazelon participated, and in People v. Kimmel, supra. The court stated in Woo Lai Chun (at 712): "We conclude that the search of the premises was a general search; it was for something not described in the search warrant; it was not made incidental to an arrest; it was for the purpose of obtaining evidence against the accused; it sought evidence not in plain view." In Kimmel, the court said (217 N.E. 2d at 787): "In the case before us the officers who searched the defendant's store did not have a general warrant, but they treated the warrant that they had as a license for a general search, and they took advantage of their presence in the bookstore to ferret out and seize whatever they considered to be contraband."

For the reasons stated, Government Exhibits 2 and 3 should have been suppressed even if the search warrant had been legally issued. We next show, however, that the warrant itself was invalid on two grounds: (1) it did not comply with the Fourth Amendment requirement that all warrants particularly describe the persons or things to be seized; and (2) it authorized a search for and seizure of objects not within the categories of Rule 41(b),

Fed. Rules Cr. Proc.

B. The warrant was invalid because it did not particularly describe the things to be seized.

A search warrant which gives a vague or generalized description of the "things to be seized" violates the Fourth Amendment, and evidence seized thereunder must be suppressed. Stanford v. Texas, 379 U.S. 476 (1965); Alioto v. United States, 216 F. Supp. 48 (E.D. Wis. 1963); United States v. Quantity of Extracts, 54 F. 2d 643 (S.D. Fla. 1931); United States v. Smith, 23 F. 2d 929 (D. R.I. 1928). A warrant's description of the things to be seized must be such that "nothing is left to the discretion of the officer executing the warrant." Marron v. United States, supra, at 196; Berger v. New York, supra, at 58; Stanford v. Texas, supra, at 485. The requirement of particularity is an essential part of the Constitution's protection against writs of assistance. Stanford v. Texas, supra, at 481-82; Trupiano v. United States 334 U.S. 699, 710 (1948). It prohibits giving an officer "a roving commission to 'seize' . . . ." Berger v. New York, supra, at 59.

The warrant in the instant case was specific in so far as it authorized the seizure of a described coat and hat. But this limitation was wholly undone because the warrant also authorized the officers to seize, and therefore to search for, "any other

instrumentalities of the aforesaid crime." "Instrumentalities of crime" is an intolerably vague description, as is proved by the fact that the judicial decisions construing that phrase are in hopeless conflict and replete with Talmudic distinctions. See Note, 54 Geo. L. J. 593, 609-14 (1966); United States v. Barbanell, 231 F. Supp. 200, 204 (S.D. N.Y. 1964).

An authority to search for (a) items which are particularly described plus (b) items which are not particularly described, obviously authorizes as general a search as a warrant which lists only (b). And in fact, as we have seen, the search which uncovered Government Exhibit 2 from the wall in which it was embedded could not have been directed toward finding the coat and hat, which were the only objects particularly described in the warrant. The warrant, therefore, was invalid because it gave the searching officers discretion to determine what items to seize and a "roving commission."

C. The warrant was invalid because it authorized a search for and seizure of objects not within the categories of Rule 41(b).

The authority of the United States Commissioner to issue the search warrant could derive only from Rule 41 of the Federal

Rules of Criminal Procedure.[10] Subsection (b) of the rule authorizes issuance of a warrant only "to search for and seize" (1) stolen or embezzled property, (2) property "designed or intended for use or which is or has been used as the means of committing a criminal offense;" or (3) property held, used or intended for use in violation of 18 U. S. Code §957, relating to property possessed in aid of a foreign government. None of these three bases was present in this case, and none was revealed in the application for the warrant.

The application (Appendix hereto) recited a police officer's belief that "the dark colored three quarter coat and plaid hat worn by Lawrence Kearney at the time he shot Gilbert Silvia" was inside Kearney's home, and requested that a search warrant "be issued for the seizure of same as instrumentalities of this crime in that they helped conceal the identity of Kearney while on the scene and in his flight." The application recited facts, derived from interviews with Silvia and the eye-witness, Stanley Warren, which gave probable cause for believing that (1) Silvia's assailant had worn a dark-colored, three-quarter coat and plaid hat and (2) Kearney was the assailant.

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10. Various statutes authorizing the issuance of search warrants in connection with particular offenses are inapplicable on their face. See, e.g., 18 U.S. Code §1595; D. C. Code §23-301.

The warrant application, however, recited no facts to support the conclusion that the coat and hat "helped conceal" Kearney's identity. Instead, that conclusion is belied by both the application and the trial testimony. The application shows that Silvia was able to give a description of the assailant, and that Warren identified the assailant as Kearney. The application recites nothing to indicate that the assailant was seeking to conceal himself by his apparel or anything else. Further, Silvia's death bed statement shows that he had had no trouble seeing his assailant. He was able to describe him as a "Negro male from, he estimated, 30, to 35 years of age, about five foot ten. . .stocky in build. . . 190 to 200 pounds. . .a medium to dark complexion" (Tr. 329-30). And Warren's trial testimony shows that Kearney had called him over, that he recognized Kearney, that he was conversing with Kearney when Silvia approached, and that Silvia asked Kearney for identification (Tr. 36-38, 44-50).

It is apparent, therefore, that the hat and coat could be considered "instrumentalities of the crime" only on a theory that the attire worn by an offender at the time of the offense is ipso facto an instrumentality of the crime. Such a theory, however, is clearly unsound. Warden, Maryland Penitentiary v. Hayden, 387 U.S. 294 (1967) (robber's jacket, trousers and cap not instrumentalities or fruits of the crime or contraband);

Morrison v. United States, 104 U.S. App. D.C. 352, 262 F. 2d 449 (1958) (assailant's handkerchief merely evidentiary material, not instrument or fruit of crime).

In sum, neither the warrant application nor the facts established the predicate under Rule 41(b) for the issuance of a warrant to search for and seize the coat and hat.[11/] We submit that this defect made the entire warrant invalid, especially since the application sought a warrant solely for those objects. But if this defect requires merely that the authorization to seize the coat and hat be stricken from the warrant, what was left of the warrant was still invalid. For the remainder, by describing the objects to be seized merely as "any other [sic] instrumentalities of the . . . crime" was hopelessly lacking in particularity. Moreover, the application alleged no probable cause for the presence of such instrumentalities on the premises.

Since the search of the defendant's home was made without a valid warrant, the search violated the Fourth Amendment, and Government Exhibits 2 and 3, the fruits of the unlawful search, were not admissible in evidence.

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11. On May 27, 1967, Warden, Maryland Penitentiary v. Hayden, supra, removed the constitutional barrier to expanding Rule 41 to permit the issuance of search warrants for evidentiary materials which are not the fruits or instruments of crime or contraband. But unless and until the Rule is amended, the authority of U.S. Commissioners to issue search warrants is obviously not correspondingly extended.

D. The error was not harmless

"[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967). No such belief can fairly be declared as to the erroneous admission of Government Exhibits 2 and 3.

The prosecution and defense evidence was closely balanced. Government Exhibits 2 and 3, combined with the ballistics testimony, made the telling implication that the defendant had a gun which could have fired the fatal shot. Supra, p. 13. In addition, in cross-examination and summation the prosecutor used the exhibits to impugn the defendant's credibility (Tr. 773-75, 790, 892) and to laud the thoroughness of the police investigation (Tr. 955).

Finally, as later appears, other erroneous rulings were made during the trial. We believe that none of the errors was harmless, but in any event it seems beyond question that their cumulative effect was highly prejudicial to the defense.

II. The trial court admitted irrelevant prejudicial evidence.

Traces of type A blood were found in the glove compartment of the car which Silvia's killer had stolen. Since Silvia's blood was type O, this evidence indicated, and both sides invited the jury to infer, that the blood in the glove compartment had

been left by the killer, who had presumably cut himself when breaking the car's vent window. Over defense objection, the trial court allowed the prosecution to introduce evidence that the defendant's blood was type A. Supra, pp.13-14. This ruling was erroneous.

If the defendant's blood had been of a type other than A, evidence of that fact would obviously have been admissible, since it would have scientifically proven that the defendant could not have been the person who bloodied the glove compartment. But the fact that the defendant's blood was of type A had no tendency to prove that he was that person, because about 41% of the population in this country, and about 35% of the Negro population, have type A blood (Tr. 431-32; 15 Am. Jur. Proof of Facts, p. 178).

Accordingly, the testimony as to the type of the defendant's blood should have been excluded on the ground that it was irrelevant.

The authorities confirm this conclusion. The cases have arisen in connection with the use of blood grouping tests when paternity is in dispute. The results of blood grouping tests are admissible if they disprove the claimed paternity. Beach v. Beach, 72 U.S. App. D.C. 318, 114 F. 2d 479 (1940). But they are not admissible if they merely prove the possibility of the claimed paternity. People v. Nichols, 314 Mich. 311, 67 N.W. 2d 230 (1954); State ex rel Freeman v. Morris, 156 Ohio St. 333, 102

N.E. 2d 450 (1951); State ex rel Isham v. Mullally, 15 Wis. 2d 249, 112 N.W. 2d 701 (1961); Miller v. Domanski, 26 N.J. Super. 316, 97 A. 2d 651 (1953); Retzer v. Retzer, 161 A. 2d 469, 471 (D.C. App. 1960); 1 Wigmore, Evidence (3rd ed. 1940) §165a. and b. The same logic obviously applies where, as here, the blood grouping tests are made in a case in which identity, rather than paternity, is in dispute.

It is no answer to say, as did the trial judge (Tr. 421), that the inconclusiveness of the blood test evidence only went to its weight. The evidence was so inconclusive that it was wrong to allow the jury to give it any weight, especially in a capital case. Moreover, jurors cannot be expected to adequately resist the allure of pseudo-scientific deductions from scientific evidence. It is no doubt for these reasons that the cases last cited held not merely that blood type evidence was inadmissible if it did not preclude paternity, but that the admission of such evidence was reversible error.

Finally, the prejudicial effect of this evidence was magnified by the prosecutor's summation to the jury. The prosecutor referred no less than three times to the fact that the defendant's blood was type A (Tr. 877, 946, 955); he closed his summation with that tidbit (Tr. 955); and he orated (Tr. 946): "And it was Type A. Is that coincidence, members of the jury. Does that not corroborate Mr. Warren who said he saw this individual in that car? That answers that."

III. The trial court admitted incompetent prejudicial testimony.

About eleven and a half hours after the shooting, Silvia was interviewed in the hospital by detective Crooke. The trial court admitted in evidence, over defense objection, (1) testimony of detective Cannon of what Crooke had told him (Cannon) had been said by Silvia; and (2) Crooke's testimony narrating his interview with Silvia. Supra, pp. 3-4.

As we later show, this testimony was erroneously admitted. The error cannot be considered harmless even though the principal issue in dispute was the identity of the assailant rather than the facts of the assault. The close similarity between Silvia's account of the episode and Warren's corroborated Warren's testimony and thereby enhanced his credibility. As the prosecutor told the jury in his rebuttal summation (Tr. 953):

> "He [defense counsel] tells you Warren is unreliable. Members of the jury, from whom did Warren get what he testified to on that witness stand, which I went over carefully with you in my main argument showing the similarity between what Warren testified and what was testified by Silvia through the mouth of Crooke on that witness stand."

This bolstering of Warren's veracity was hurtful to the defense. Warren was the only government witness to identify the defendant as the assailant. The other eye witnesses (Ramsey, testifying for the defense, and Silvia, in his hospital statement)

could not identify the assailant and described him in a way which did not fit the defendant. See supra, pp. 8, 14-15. Warren thus was the government's key, indispensable witness, and the case ultimately came down to whether the jury would believe him on the one hand or the defendant and the alibi witnesses on the other.

A. Cannon's testimony concerning Silvia's statement was inadmissible.

Cannon's testimony was hearsay on hearsay. It does not come close to fitting within any known exception to the general rule that hearsay is incompetent evidence.

The testimony was admitted during redirect examination of Cannon (Tr. 209-10). On preceding cross-examination, the defense attorney asked Cannon whether he had talked to anyone that had seen or received a report that a man was running from the scene of the crime. Cannon answered in the negative, (Tr. 204.) The trial court agreed with the prosecutor's view that by having asked this question the defense had "opened the door" to the admission of Cannon's hearsay-on-hearsay account of Silvia's hospital statement (Tr. 207-08). Since this theory rests neither on a perceptible chain of logic nor on known precedents, it defies analysis and requires no refutation.

B. Crooke's testimony of Silvia's statements was inadmissible.

1. The testimony was not admissible as a "spontaneous utterance."

The admission of Crooke's testimony as a "spontaneous utterance" was also erroneous.

There is, of course, a recognized exception to the hearsay rule for what Wigmore calls "spontaneous exclamations." 8 Wigmore, Evidence (3rd ed., 1940) §1745, n. 1. This exception is described by Wigmore in a passage from which this Court has repeatedly quoted:

> "[U]nder certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective facilities and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness), and thus as expressing the real tenor of the speaker's belief as to the facts just observed by him; and may therefore be received as testimony to these facts." 6 Wigmore, op. cit., §1747, quoted in part in Beausoleil v. United States, 71 U.S. App. D.C. 111, 113-14, 107 F. 2d 292, 294-95 (1939); Brown v. United States, 80 U.S. App. D.C. 270, 152 F. 2d 138, 139 (1945); Guthrie v. United States, 92 U.S. App. D.C. 361, 207 F. 2d 19, 22 (1953); Wheeler v. United States, 93 U.S. App. D.C. 159, 211 F. 2d 19, 24 (1953); Lampe v. United States, 97 U.S. App. D.C. 160, 229 F. 2d 43, 46 (1956); Baber v. United States, 116 U.S. App. D.C. 358, 324 F. 2d 390, 393 (1963); United States v. Edmonds, 63 F. Supp. 968, 972-73 (D. Dist. Col.).

The trial court relied on Guthrie v. United States, supra (Tr. 334). There the Court sustained, as a permissible exercise of trial court discretion, the admission of a "spontaneous utterance" made by a victim of an assault about eleven hours after the assault and in answer to a question of a police officer. In the present case, Silvia was interviewed about eleven and a half hours after the assault, and some of his statements were made in response to interrogation. If those were the only relevant circumstances, the admission of Silvia's out-of-court statements would be sustainable under Guthrie as a borderline spontaneous utterance. There were, however, other factors which make the admissibility ruling here far more extreme than rulings reversed by this Court in Lampe and Brown, supra, and Smith v. United States, 94 U.S. App. D.C. 320, 215 F. 2d 682 (1954).

On top of the important, even if not dispositive, facts that Silvia's statements were made in response to questioning and a substantial time after the exciting event,[12/] the following significant circumstances in (1) the nature of Silvia's statements and (2) their setting disqualify them from being "spontaneous utterances."

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12. "That the statements . . . were made in response to inquiry is not decisive of the question of spontaneity, . . . although that fact is entitled to consideration. Likewise, while the time element is important, it is not in itself controlling." Beausoleil v. United States, supra, 107 F. 2d at 295; Guthrie v. United States, supra, 207 F. 2d at 23. See also Smith v. United States, supra.

(1) In Guthrie, the utterance admitted as spontaneous consisted of a declaration by an assault victim that "Harry did it," plus "a few words" describing the assault. This was said as a single reply to a police officer who had simply "asked her what had happened." (207 F. 2d at 21.)

In the present case, Crooke's interview with Silvia lasted from ten to twelve minutes. It took Crooke more than four pages of transcript (Tr. 380-84) to summarize to the jury Silvia's account of the episode. Silvia's statements were lengthy, coherent, acutely perceptive, detailed and precise. When Crooke arrived, Silvia greeted him and expressed concern for his (Silvia's) wife and family. He told Crooke he understood the importance of the interview. Crooke asked not one question but many. See supra, pp. 3-9.

In short, what Crooke testified to was a full, structured discussion, not a few, conclusory, gasped words. The criteria stated in the above-quoted passage from Wigmore did not exist. Silvia's "reflective facilities" were not "stilled," and "their control" was not "removed." The remarks were not made "under the immediate and uncontrolled domination of the senses." Silvia was suffering pain and in a critical state. But these conditions are not the same as "nervous excitement." To the contrary, Silvia had just come out of deep anesthesia. A "calm narrative" is not

admissible as a "spontaneous utterance." Brown v. United States, supra, 152 F. 2d at 139. And Silvia's statements, though made in pain, were calm.

We have found no reported case, and we believe there is none, which has stretched the "spontaneous exclamation" exception to include so long a discussion, let alone one so analytical and reflective.

(2) The setting here was vastly different from that in Guthrie. There the utterances admitted as "spontaneous" were made by the victim while still on the scene of the brutal assault, before she had received medical treatment, and to the first person who addressed her after the assault. In Lampe v. United States, supra, 229 F. 2d at 46, this Court held that Guthrie did not sanction the admission of coherent remarks of an assault victim who "had been in the hands of public authorities for about six hours, during the latter part of which he was in a hospital under medical care." Here, Silvia had been in the hands of public authorities for about eleven hours and he had received extensive medical and surgical treatment.

An out-of-court statement can "qualify as an excited utterance or spontaneous declaration" only if "prompted by the exciting event" to which the statement refers. Murphy Auto Parts Co. v. Ball, 101 U.S. App. D.C. 416, 249 F. 2d 508, 511 (1957). Here

the "exciting event" of a surgical operation intervened between the event to which the statements referred and the statements themselves. It cannot reasonably be found that the statements were prompted by the earlier of the two "exciting events."

2. The testimony was not admissible as a "dying declaration."

Although Silvia died the morning after the interview, his out-of-court statements were not admissible under the "dying declaration" exception to the hearsay rule.

The Supreme Court has erected formidable barriers to the admission of claimed "dying declarations." As the following quotations show, it is prerequisite to admissibility that there be established by evidence not only that death soon followed, but also that the declarant (a) realized that he was in extremis, and (b) had no hope of recovery.

> "To make out a dying declaration the declarant must have spoken without hope of recovery and in the shadow of impending death." (Shepard v. United States, 290 U.S. 96, 99 (1933).).
>
> "There must be a 'settled hopeless expectation' . . . that death is near at hand, and what is said must have been spoken in the hush of its impending presence." (Id. at 100.)
>
> "What is decisive is the state of mind. Even so, the state of mind must be exhibited in the evidence, and not left to conjecture. The patient must have spoken with the consciousness of a swift and certain doom." (Ibid.)

> "The point is to ascertain the state of mind at the time the declarations were made. The admission of the testimony is justified upon the ground of necessity, and in view of the consideration that the certain expectation of almost immediate death will remove all temptation to falsehood and enforce as strict adherence to the truth as the obligation of an oath could impose. But the evidence must be received with the utmost caution, and if the circumstances do not satisfactorily disclose that the awful and solemn situation in which he is placed is realized by the dying man because of the hope of recovery, it ought to be rejected." (Mattox v. United States, 146 U.S. 140, 152 (1892).)
>
> "[I]n the admission of the declarations of the victim as to the facts of a homicide the utmost care must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution." (Carver v. United States, 160 U.S. 553, 554 (1896).)

In the present case, the admission of Silvia's statements cannot be justified as dying declarations because the trial court did not find the facts prerequisite to admissibility. Indeed, the trial court impliedly found that the necessary foundation had not been laid. For the court admitted the statements only as "spontaneous utterances," although the prosecutor had requested that they also be admitted as dying declarations (supra, p. 4). Obviously, this Court cannot make evidentiary foundational findings which the trial court did not make and impliedly rejected.

Furthermore, an adequate foundation was not in fact laid. For there was no evidence that Silvia realized that death was imminent, that he had been so informed either by his doctors

(as had the declarant in Mattox v. United States, supra),[13] or by such a circumstance as receiving extreme unction (as in Carver v. United States, 164 U.S. 694 (1897)). Still less was there evidence that he had no hope of recovery. Silvia told Crooke, "Take care of my wife and family" (Tr. 323). But that statement could reflect an expectation of prolonged illness rather than of imminent death, nor does it necessarily imply an utter abandonment of hope of recovery. In Shepard v. United States, supra, the declarant told her nurse that "she was not going to get well; she was going to die: (at 98). Despite this remark, which was less ambiguous than Silvia's, the Court held that the foundational prerequisite of hopelessness had not been established, stating (at 99), "She may have thought she was going to die and have said so to her nurse, but this was consistent with hope, which could not have been put aside without more to quench it."

IV. The trial court erroneously and prejudicially restricted cross-examination of the government's key witness.

The trial court manifestly erred in refusing to allow the defense to explore by cross-examination whether Warren, the

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13. Silvia's surgeon testified that he had no knowledge that Silvia was told that he was in critical condition or faced with impending death (Tr. 318).

government's eye witness, was a user of narcotics and under the influence of narcotics at the time he witnessed the shooting and at the time he gave the police a pre-trial statement identifying the defendant as the man who shot Silvia. Supra, pp. 10-11.

It is elementary that when identification is in issue, the cross-examiner must be permitted to inquire into the possible existence of conditions impairing the witness' capacity to observe, such as poor eyesight (Battle v. United States, 120 U.S. App. D.C. 221, 345 F. 2d 438, 440 (1965)) or intoxication. 3 Wigmore, Evidence (3rd ed. 1940) §933; 8 ALR 3d 749 (collecting cases); Rheaume v. Patterson, 289 F. 2d 611, 614 (2d Cir. 1961). Surely the capacity to observe can be as readily impaired by drugs as by alcohol or bad sight. Moreover, Wilson v. United States, 232 U.S. 563 (1914), held that it was error to exclude cross-examination as to whether a witness was under the influence of drugs at the time of testifying. It would make little sense to rule that drugs can affect the testimonial power of recollection but not the testimonial power of observation.

The proposed line of inquiry was also admissible under another theory. The better authorities hold that cross-examination on the habitual use of drugs is permissible for the purpose of impeaching a witness' credibility. 3 Wigmore, Evidence (3rd ed. 1940) §934; Chicago & N. W. Ry. v. McKenna,

74 F. 2d 155, 158-59 (8th Cir. 1934); Lankford v. Tomari, 35 Wash. 2d 412, 213 P. 2d 627, 632 (1950); People v. Lewis, 25 Ill. 2d 396, 185 N.E. 2d 168 (1962); People v. Crump, 5 Ill. 2d 251, 125 N.E. 2d 615 (1955).

The trial court's error was particularly unfortunate because the proposed interrogation was not just a random shot in the dark. As was brought to the trial court's attention, Silvia told the police, when interviewed on his death bed, that he felt that the individual (i.e., Warren) who had been with his assailant "might be a junkie because of something about his eyes that [Silvia] could not describe." Supra, p. 10.

The trial court seems to have taken the inexplicable view that the proposed cross-examination would be admissible only if the defense first introduced extrinsic evidence that Warren was a user of narcotics (Tr. 55-57). Thereby the trial court stood the law on its head. The correct rule is that cross-examination may, within limits, interrogate a witness to show his bad moral character or acts of misconduct, but that "the examiner is not free to bring in independent proof to show that the answer is untrue." See Foster v. United States, 282 F. 2d 222, 223 (10th Cir. 1960). (Of course, both cross-examination and extrinsic evidence were permissible on the question of whether Warren was under the influence of drugs at the time

of the episode. For that question related not merely to his character, but to a possible impairment of his capacity to observe.)

The trial court also erred in precluding the defense from cross-examining Warren on whether he had been prematurely released from confinement for the purpose of the trial (supra, p. 11). Confinement for a juvenile offense might not be admissible solely to impugn the witness' character. But the proposed interrogation was not for that purpose, but for one of the conventional, permissible objectives of cross-examination, to show that the witness' testimony may have been influenced by his receipt of a benefit from the government.

The erroneous restriction of Warren's cross-examination was unquestionably prejudicial in view of the fact that he was the government's key, indispensable witness. Furthermore, the prosecutor unfairly exploited the exclusionary ruling which he had prompted. First he got the defendant to say on cross-examination that Warren had implicated him because Warren was a user of drugs (Tr. 743-44, 772-78, 781-84). Then in summation the prosecutor suggested to the jury that the defendant had lied when he made that accusation because there was no evidence for it other than his self-serving word (Tr. 952).

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX - Copy of Application for Search Warrant, G. Ex. I for Id.

Docket 28 - Case 86

1967

AFFIDAVIT IN SUPPORT OF AN APPLICATION FOR AN UNITED STATES COMMISSIONER'S SEARCH WARRANT FOR 1442 CORCORAN STREET, NORTHWEST, WASHINGTON, D. C., APARTMENT NUMBER 1, FIRST FLOOR, OCCUPIED BY LAWRENCE KEARNEY AND PATRICIA KEARNEY.

About 11:00 p.m. Thursday, November 23, 1967 Plainclothesman Gilbert M. Silvia, Metropolitan Police Department, attached to the Criminal Investigation Division, Third Precinct, while at the intersection of 16th and Corcoran Streets, Northwest, Washington, D. C., was shot one time in the lower left chest with a pistol held in the hands of an unknown Negro male.

The officer was removed to the Washington Hospital Center and treated for the above described wound. Gilbert M. Silvia was pronounced dead at 2:10 a.m. Saturday, November 25, 1967. The body was removed to the D.C. Morgue. An autopsy performed on the decedent that same day by Deputy Corpner Dr. Linwood L. Rayford and the cause of death was found to be a gunshot wound to the chest.

About 11:00 a.m. Friday, November 24, 1967, Gilbert Silvia was interviewed at the Washington Hospital Center and stated

that just prior to 11:00 p.m. Thursday, November 23, 1967, and while he was working the 4:00 p.m. to 12 midnight tour of duty and while operating a police department cruiser by himself south on 16th Street, N.W., he observed a Negro male breaking open a vent window on a Chevrolet sedan parked on the southeast corner of 16th and Corcoran Streets, N. W. He stopped and kept this subject under observation, watched the subject open the right front door on which the vent window had been smashed and get into the auto. At that time Silvia noticed another Negro male approach the auto from the east side, open the right door of the car and apparently say something to the first subject, who was then seated behind the steering wheel. Silvia then pulled his cruiser around and up behind the Chevrolet and alighted.

Silvia approached the Chevrolet on the left or driver's side holding his badge in one hand and his flashlight in the other. He identified himself to the subject behind the wheel, who then slid out of the car on the right side. When this subject got to the sidewalk he turned back towards Silvia and fired one shot from a pistol, striking Silvia. Both subjects then ran east on Corcoran Street.

Silvia described the first subject, who had been inside the car, as a Negro male 30 to 35 years old, 5'10" tall, stocky build, wearing a three-quarter length coat, dark in color,

and a dark plaid hat. He described the second man as being Negro, about 20 to 25 years old, thin build, about 6' tall, wearing a white trench coat and snap brimmed hat.

Lawrence Kearney was arrested at 12:45 a.m. Saturday November 25, 1967, at his home address by the undersigned officer. At the time of his arrest he was wearing a brown colored cap, brown cardigan sweater and brown trousers.

On Sunday, November 26, 1967, investigation led the undersigned to a Negro male, 16 years of age, who was alleged to have been a witness to the shooting of Officer Silvia. This 16-year old was interviewed the same day (November 26, 1967) and he related the following. That about 11:00 p.m. Thursday, November 23, 1967, he was walking west on the south side of the 1500 block of Corcoran St., N.W. As he neared the intersection of 16th Street, he noticed someone seated behind the steering wheel of a 1961 Chevrolet, white in color, parked to the curb. Then he noticed the man was a man known to him as "Larry". The juvenile said he then saw a white police cruiser parked around the corner on 16th Street. He stopped by the right door and told "Larry" about the policeman. He then said the policeman drove around behind the Chevrolet, got out and walked up to the driver's side and asked "Larry" if the car was his. He heard "Larry" say "yes" and then saw the policeman show his badge to

"Larry" and ask "Larry" for some identification. The juvenile said that "Larry" then got out of the car on the passenger's side, pulled a pistol from his pants and turn and shoot the policeman. He identified a color photo of Lawrence Kearney, male, Negro, 28 years, of 1442 Corcoran St., N.W., Apt. 1, as the "Larry" referred to. He further stated at the time of the shooting Kearney was wearing a hat and a suburban coat, dark in color.

The name and further description of this juvenile is being withheld for fear that if his name and address were made known he would be subject to serious bodily harm on the street. However, the basis for believing him to be reliable in his information is the fact that his statement is corroborated by what Det. Silvia told the interviewing officers; the juvenile gave a signed statement to the police; and on November 27, 1967, the juvenile testified under oath before a grand jury in the Federal District Court to the same facts as presented above.

The Chevrolet Kearney had been seated in was a 1961 model, white in color, bearing Conn. registration EC-2414. It was ascertained that the car was owned by a Thomas A. Callaghan of 1607 16th St., N.W., and, when interviewed, stated he had not given anyone permission to break, enter or use his auto, and did not know Lawrence Kearney.

Based on the previously described statements it is

the firm belief of the undersigned that the dark colored three quarter coat and plaid hat worn by Lawrence Kearney at the time he shot Gilbert Silvia are now inside the home address of 1442 Corcoran Street, N.W., Washington, D.C., Apartment 1, first floor, occupied by Lawrence Kearney and wife Patricia Kearney, and request that a United States Commissioner's Search Warrant be issued for the seizure of same as instrumentalities of this crime in that they helped conceal the identity of Kearney while on the scene and aid in his flight.

Robert M. Boyd
Detective Sergeant
Metropolitan Police Department

SWORN AND SUBSCRIBED BEFORE ME THIS 27th DAY OF NOVEMBER, 1967

Sam Wertleb, United States Commissioner

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,411

UNITED STATES OF AMERICA

V.

LAWRENCE KEARNEY,

--- Appellant

Appeal from the United States District Court for the District of Columbia

---

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

THE VIOLATIONS OF THE FOURTH AMENDMENT*

A. The government's "preliminary" suggestion.

The government suggests (Br. 13, 24) that appellant cannot complain of the seizures made in the search of his apartment on November 27, 1967, because the police could have searched his apartment as an incident to his arrest in the early morning of November 26, 1967. It is hard to believe that once a man is

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*We feel no need to reply with respect to the other questions raised in our principal brief.

arrested in his home, he and his family thereafter forfeit all rights to privacy against future police searches of the home. And to the contrary, Preston v. United States, 376 U.S. 364 (1964), makes it clear that a search which is remote in either time or place from an arrest cannot be justified on the ground that the search could have been lawfully made contemporaneously with the arrest.

B. The seizure of items not mentioned in the warrant.

The government claims (Br. 18-20) that police officers who are lawfully on premises by reason of a search warrant may seize items they come across other than those described in the warrant. And this is true, it is alleged, not only of contraband, but also, in light of Warden v. Hayden, 387 U.S. 294 (1967), of "merely evidentiary" material.

The government's position is irreconcilable with the facts that (1) the Fourth Amendment explicitly requires that warrants particularly describe the person or things to be seized, and (2) it is impregnable doctrine that evidence seized in violation of the Fourth Amendment is inadmissible. See our principal brief, p. 17.

The government relies on statements in Harris v. United States, 331 U.S. 145, 155 (1947), and Alderman v. United States, decided March 10, 1969, n. 10. Insofar as these statements may comprehend the seizure of items not specified in a search warrant, they are dicta. In Harris, the officers were on premises with arrest warrants, and the search and

seizures were held valid as ancillary to a lawful arrest. Harris thus in no way collides with Marron v. United States, 275 U.S. 192, part one of which held that seizures of items not specified in a search warrant could not be justified by reason of the warrant, and part two of which held that the seizures were justified because they were ancillary to a lawful arrest. In Alderman, there was no warrant at all. Neither Alderman nor Harris considered, much less overruled, Marron.

Moreover, the statements in Harris and Alderman were expressly limited to contraband, the mere "possession of which is a crime" (Harris at 155), and not to merely evidentiary items, as is the case here. To extend Harris to evidentiary matter amounts to repealing the particularity portion of the Fourth Amendment and authorizing general searches. See Judge Keating's thoughtful opinion in People v. Baker, 23 N.Y. 2d 307, 296 N.Y.S. 2d 745, 752-54.

As we pointed out in our principal brief (pp. 16-19), it is true that various courts below the Supreme Court level, including this one, have misunderstood and departed from Marron. But cf. People v. Baker, supra. Even so, those cases, as the government's brief shows (p. 22), also involved only contraband.

The government is brash in claiming (Br. 23) a "withering" of Marron. The concurring opinion of three Supreme Court justices in Stanley v. Georgia, decided April 7, 1969, refutes this claim. It states:

> "The controlling constitutional principle was stated in two sentences by this Court more than 40 years ago:

'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' Marron v. United States, 275 U.S. 192, 196.'

"This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence @citing Warden v. Hayden, 367 U.S. 294] in plain view."

For other recent cases which rely on Marron, see Berger v. New York, 388 U.S. 41, 58; Stanford v. Texas, 379 U.S. 476, 485; People v. Baker, supra.

The spent bullet and live cartridge seized in appellant's home were not contraband, and the searchers saw no criminal activity in the home. The spent bullet, dug out of a wall, was not "in plain view." Although both items were eventually to be admitted as "criminal evidence," they were not "criminal evidence in plain view," because their evidentiary value depended on ballistic tests. So in Stanley v. Georgia, the concurring justices condemned the seizure of obscene films because "the contents of the films could not be determined by mere inspection."

The government seeks to distinguish Marron on the ground that it involved the seizure of "documents of a communicative and testimonial nature" (Br. 21). But the first part of Marron, which held that items could not be seized under a warrant which did not describe them, did not go on the basis that the items were not subject to seizure because of their testimonial nature. To the contrary, the second part of Marron

held that the items were seizable as instrumentalities of crime found in a search incident to a lawful arrest. Furthermore, the items in Marron included not only a ledger, which was a record made by the accused, but also bills from creditors. The latter were obviously not "communicative" or "testimonial" records of the accused.

The government argues (Br. 24) that the spent bullet (but not the live cartridge) was "abandoned" property. The bullet was not left behind in a hotel room or found in a public waste receptacle. It was in the wall of appellant's home. We think that people do not "abandon," for seizure by the police, anything that is in their home, including garbage waiting to be carried out.

C. The vagueness of the warrant.

In our principal brief (pp. 21-22), we contend that the warrant was vague, and hence violative of the Fourth Amendment, because it authorized a search for "any other instrumentalities of the . . . crime" of Silvia's murder. The obscurity of that phrase is, we think, demonstrated by the fact that the government's brief (pp. 15-16, 24) seeks to bring within its scope (a) an assailant's hat and coat, which manifestly did not hide his identity or appearance; (b) a live cartridge which was found in a bureau drawer, not in the murder weapon or near the murder scene; (c) a bullet which had been fired at some unknown time into a wall, not at the victim.

D. The lack of authority to issue the warrant.

The government argues (Br. 14-15) that appellant's trial counsel waived this objection by failing to raise it below. We submit that counsel preserved the record by objecting to the admission of the seized evidence, even if he did not assign every possible legal reason for his objection. This is particularly so because the sworn application for the warrant concealed the Commissioner's lack of authority by falsely reciting that the hat and coat were "instrumentalities of this crime in that they helped conceal the identity of Kearney while on the scene and aid in his flight" (our principal brief, p. 46). Furthermore, it is beyond our comprehension that there is "no violation of a constitutional right" (Gov. Br. 15) when police enter and search a private home under the authority of an invalid warrant.

E. The harmless error claim.

The government states that any error in the admission of the live cartridge and slug was harmless beyond a reasonable doubt because, "The case against appellant was overwhelming" (Br. 25). This assertion is curiously documented, since the government recites in its support only the government's evidence without noting the defense evidence.

The government's case was strong, since it included the testimony of Warren, an eye witness, and evidence that appellant's palm prints

were in the car.* But the defense case was also strong, since it included the testimony of three alibi witnesses and the testimony of another eye witness to the crime who believed that the assailant was taller than appellant. See our principal brief, pp. 14-15.

Respectfully submitted,

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*There was no evidence of when these prints were left in the car. Hence Warren's testimony was indispensable to the government's case.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,411

UNITED STATES OF AMERICA

v.

LAWRENCE KEARNEY,

Appellant

Appeal from the United States District Court for
the District of Columbia

PETITION FOR REHEARING

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UNITED STATES COURT OF APPEALS
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Appeal from the United States District Court for the District of Columbia

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PETITION FOR REHEARING

Appellant, Lawrence Kearney, petitions for rehearing.

A. The Restriction of Warren's Cross Examination.

The Court holds that the defense was not erroneously prevented from cross-examining Warren on the use of narcotics because "the disposition in the trial court was intended not to preclude an exploration of the issue, but to defer cross-examination pending

establishment of a foundation for the questions" (slip op. 7).* This holding necessarily assumes that (a) the trial court could properly require a foundation for each of the questions the defense sought to ask and (b) that the foundation required was appropriate for each of the questions. These assumptions are untenable, from which it follows that the Court's holding is unsound.

1. It is important to differentiate among the questions which defense counsel desired to put to Warren. The Court states (slip op. 4), "Counsel said he would like to ask Warren whether he is a narcotics user and whether he was on narcotics when he gave a statement to the police." This statement is inaccurate, for counsel stated that he wished to ask Warren not only the two questions mentioned but also a third.

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*The Court's opinion ignores our contention that the cross-examination of Warren was also erroneously restricted because the trial court precluded the defense from attempting to show that Warren had been prematurely released from confinement for the purpose of the trial. See Brief for Appellant, p. 40. We ask that the Court grant rehearing for the purpose of considering this point.

What counsel said was this (Tr. 55, emphasis supplied):

> "I would like to ask him, one, whether he is a narcotics user, and whether he was on narcotics that evening. And secondly, on narcotics when he gave a statement to the police."*

Unlike the two questions mentioned by the Court, the underlined question sought to directly explore whether there was a physical impairment of the witness' ability to observe the events to which he had testified on cross-examination. It was no different, in this respect, than a question of an eye-witness as to whether he had been intoxicated or sleepy or without his glasses at the time of the episode. We believe that it is both unheard of and unreasonable to condition such cross-examination on the prior establishment of an evidentiary foundation that an affirmative answer is expectable.

Trial counsel knew that Warren's testimony was flatly

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*In the ensuing colloquoy, the discussion related only to the two questions referred to by this Court. But this fact did not erase trial counsel's initial statement, nor does the Court hold that he abandoned the question of "whether he was on narcotics that evening."

2. Even if it be assumed that the trial court could condition the cross-examination on the laying of a foundation, the court erred because the particular condition it imposed was inappropriate and unreasonable as to two of the three questions projected by defense counsel.

The trial court did not rule in the abstract that a foundation had to be laid. It ruled that the questions could not be asked until trial counsel first interrogated Crooke. Since Crooke had taken Warren's statement, there was reason to believe that he had knowledge relevant to the question of whether Warren was "on narcotics" when he gave his statement to the police. But neither the trial court nor defense counsel had any reason to believe at the time of the ruling that Crooke had knowledge on the two other, more important questions, whether Warren was under the influence of drugs at the time Silvia was shot or was an habitual user of drugs.*

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*As pointed out in the government's brief (p. 48, ftn. 103) we misinterpreted the record in our original brief (pp. 10, 39) in supposing that prior to the court's ruling defense counsel had received and called to the court's attention Crooke's statement of his interview with Silvia.

3. This Court justifies the requirement of a foundation on the ground that, "There is an interest in avoiding undue evidentiary assault on prosecution witnesses" (slip op. 7). The Court's holding, however, is not a sound way of serving that interest. The holding affirms a trial court ruling requiring that an evidentiary foundation be laid before a witness can be cross-examined on the suspected use of drugs. On the one hand, such a rule does not avoid "evidentiary assault" on the witness. There is no perceptible difference in the insinuation, if any, between asking witness A whether he uses drugs and asking witness B whether A uses drugs. On the other hand, such a rule will, in most instances, effectively preclude cross-examination on the subject and thereby insulate those witnesses whose testimony is unreliable because of their drug addiction.

We suggest that it is neither desirable nor necessary to impose any foundation condition on cross-examination seeking to explore whether a key witness was under the influence of drugs at the time of the critical episode or is a drug user. The

trial court is able to protect the witness from an undue assault by controlling the number and kind of questions on the subject. At most, the only foundation condition should be a representation by counsel that he has good-faith grounds to believe that the witness is a recent user of drugs. (Even this condition, however, should not apply to a simple inquiry as to whether an eye witness was under the influence of drugs at the time of the episode.)

The suggested condition was met in this case by defense counsel's representation to the trial court that, "We have information that he is a narcotics user" (Tr. 55). The trial court could, at that point, have legitimately required counsel to divulge the source of his information, which was undoubtedly the defendant. Instead of doing so, the trial court precluded legitimate cross-examination by requiring an inappropriate and unreasonable evidentiary foundation.

As matters stand, we will never know how Warren would have answered the question, "Were you under the influence of narcotics when you saw the shooting you have testified to?" Had the question been allowed and answered "Yes," it is quite certain that appellant would have been acquitted. Nor can one discount

as negligible the possibility of an affirmative answer, since, as we now know, the experienced and perceptive Silvia thought that Warren "might be a junkie because of something about his eyes" (Brief for Appellant, p. 10). If the answer had been "No," Warren would not have been injured. By imposing a novel and purposeless technicality, the trial court violated the principle that the primary objective of a trial is to uncover the truth, and unfairly denied appellant an opportunity to preserve his liberty by proving that the government's key testimony was unreliable.

Moreover, this Court's decision establishes a precedent which is likely to inspire restrictions of legitimate cross-examination by artificial foundation requirements. By our observation there appears to be no significant problem in this jurisdiction of "undue evidentiary assault[s] on prosecution witnesses." But excessive curtailment of cross-examination is not an infrequent occurrence. This genuine problem should not be aggravated in the cause of affording protection against a non-existent problem.

B. The Admission of Crooke's Account of His Interview of Silvia.

Although the portion of the Court's opinion on this subject is headed "Admissibility of Reliable Testimony Under Exceptions to Hearsay Rule" (slip op. 9), the Court does not in fact hold the testimony admissible under any known exception to the hearsay rule. To the contrary, the Court expressly refrains from deciding "whether the statement properly qualified, in a technical sense, as either an excited utterance, as it was labeled by the trial judge, or a dying declaration" (slip op. 9). Crooke's account of Silvia's statement is ruled competent on the grounds that (1) "the trial judge ruled the testimony admissible on a finding of overall reliability,"* and (2) the finding cannot be held erroneous

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*We dispute the accuracy of the quoted excerpt. In announcing his ruling the trial judge stated (Tr. 334-45): "The Court relying on Guthrie vs. the United States finds from the evidence that the statements made by the decedent will be admitted into evidence under the spontaneous utterances that it was made during a period of nervous stress and the shock which is caused by physical violence when the victim is presumed to be incapable of artifice or premeditation to serve his own interest. The Court feels that under all the conditions existing that the statement should be admitted into evidence on those grounds in accordance with the Guthrie case." The fair reading of this passage is that the trial court found that the statement was a "spontaneous utterance" and therefore admissible because of a legal presumption that such utterances are reliable.

because Silvia's statement "is in the penumbra of both the spontaneous utterance and dying declaration exceptions to the hearsay rule"* and "was made under circumstances that conform to the general policies underlying the exceptions to the hearsay rule" (slip op. 9-10).

The Court has thus applied in this case an evidentiary theory contrary to that which has heretofore prevailed in this and other federal Circuits. Up to now, the universal rule has been that hearsay is inadmissible unless it comes squarely within one of the discrete exceptions (or a statutory exception) to the hearsay rule. Hearsay statements outside the exceptions have not been considered competent evidence because they were "fundamentally

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"We think we are justified in registering a complaint that the Court has incorrectly described our contentions on the spontaneous utterance issue. The Court's opinion makes it appear that our argument was based "on the fact that the statement was made almost twelve hours after the stimulating event and that it was given in an interview in response to questions" (slip op. 9, ftn. 11). But we expressly stated in our brief (p. 32) that, "If [the time lapse and questioning] were the only relevant circumstances, the admission of Silvia's out-of-court statements would be sustainable under Guthrie as a borderline spontaneous utterance." We then argued at length that there were on top of these facts significant circumstances in the nature and setting of Silvia's statement which disqualified it from being a spontaneous utterance.

reliable," within the "penumbra" of the recognized exceptions, or "made under circumstances that conform to the general policies underlying the exceptions to the hearsay rule."

Thus it was stated in Brinegar v. United States, 338 U.S. 160, 174 (1949):

> "Guilt in a criminal case must be proved beyond a reasonable doubt and by evidence confined to that which long experience in the common-law tradition, to some extent embodied in the Constitution, has crystallized into rules of evidence consistent with that standard. These rules are historically grounded rights of our system, developed to safeguard men from dubious and unjust convictions, with resulting forfeiture of life, liberty and property."

The conventional approach to hearsay is illustrated by such cases as Shepard v. United States, 290 U.S. 99 (1933), and Lampe v. United States, 97 U.S. App. D.C. 160, 229 F. 2d 43 (1956). These held that out-of-court statements were erroneously admitted because they did not satisfy traditional, technical requirements for dying declarations (Shepard) or spontaneous utterances (Lampe). It seems never to have occurred to the authors of the opinions that it was necessary to determine whether the statements were within the penumbra or policy of the hearsay exceptions.

Nor is this approach outmoded. This Court recently affirmed

"our strong and continuing endorsement of the principle that hearsay statements are not to be considered by juries." Jones v. United States, 128 U.S. App. D.C. 36, 375 F. 2d 296, 300 (1967). And the Supreme Court, still conservatively operating "under traditional rules of evidence," considers hearsay admissible only if it is within "any recognized exception to the hearsay rule." See Bruton v. United States, 391 U.S. 123, 128, ftn. 3 (1968).

It must be emphasized that in this case the Court has not merely created a new specific exception to the hearsay rule or extended an old exception. It has, instead, superseded all the old categories of exceptions by a generalized concept that a hearsay statement is admissible if it appears to be fundamentally reliable and within the underlying policies of the hearsay exceptions.

An acknowledged innovation along the lines of the Court's holding has been suggested in Rule 8-04 of the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates (1969). See 46 F.R.D. 161, 325-28, 345, 377. But the draft is still being circulated for suggestions,

and "has not yet been submitted or considered by the Judicial Conference or the Supreme Court." 46 F.R.D. 171-72. This Court has jumped the gun.

What is even more surprising is the way in which this sweeping innovation has been made. The Court's opinion evinces no awareness that it has made a comprehensive revision of the existing law on hearsay; the opinion does not discuss the pros and cons of the new doctrine;* and, of course, the matter was not briefed by unsuspecting counsel. We submit that rehearing should be ordered so that these deficiencies may be remedied.

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*For example, there is no recognition in the opinion that expanding the admissibility of hearsay correspondingly diminishes the right of confrontation and thus presents constitutional problems. Cf. Pointer v. Texas, 380 U.S. 400 (1965); Bruton v. United States, supra.